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No. 07-499

IN THE

Supreme Court of the United States

DANIEL GIRMAI NEGUSIE,

Petitioner,

—v.—

MICHAEL B. MUKASEY, ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE AMERICAN JEWISH COMMITTEE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Decades after the now expired 1948 Displaced Persons Act (DPA) prohibited the issuance of a visa to an alien who "assisted the enemy in persecuting civil populations of countries, Members of the United Nations" or "voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations", the Refugee Act of 1980 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the Immigration and Nationality Act (INA) to prohibit the granting of asylum to, or the withholding of removal of, an alien who "ordered, incited, assisted, or otherwise participated in the persecution" of others based on their "race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A); INA § 241(b)(3)(B)(i), 8 U.S.C. § 1231(b)(3)(B)(i).

The question presented is whether the voluntariness of an alien's service as an armed guard of persecuted prisoners, deemed by this Court in 1981 to be irrelevant to visa eligibility under the DPA, is, in contrast, relevant to asylum or withholding under the INA.

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INTEREST OF THE AMICI CURIAE[1]

The American Jewish Congress

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. It has a long history of combating anti-Semitism both in the United States and abroad, and, specifically, has encouraged the prosecution of denaturalization cases against alleged Nazi war criminals to provide assurances that such criminals do not find a haven in this country.

The Court of Appeals for the Fifth Circuit relied on *Fedorenko v. United States*, 449 U.S. 490 (1981), which resulted in the denaturalization of an alleged Nazi war criminal, to deny asylum and withholding to the Petitioner in the instant case. The American Jewish Congress has an interest in seeing that the decision in *Fedorenko* (in which it filed an *amicus* brief) retains its meaningfulness and applicability to questions of immigration law and not become a misapplied mechanism for excluding all aliens who, forced under threat of death or torture to assist in

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[1] The parties have consented to the filing of this brief, and their written letters of consent accompany it for filing with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

violence, seek refuge in this country from that violence.

The American Jewish Committee

The American Jewish Committee, a not-for-profit human relations organization of approximately 175,000 members and supporters and 32 regional chapters, was founded in 1906 to combat anti-Semitism and other forms of bigotry and promote human rights for all. Out of a determination that the perpetrators of the Nazi Holocaust not find safe haven in the United States, the American Jewish Committee has supported efforts to bring them to justice. At the same time, out of a deep commitment to humanitarian refugee policy, and a recognition that both the law and the historical context have changed since the post-World War II era, the American Jewish Committee believes that an inquiry into culpability is warranted where, as here, an asylum seeker credibly alleges to have acted under threat of torture or death. If found not culpable, such a refugee should not be precluded from a grant of asylum.

SUMMARY OF THE ARGUMENT

The Substantive Issue in Perspective

In *Fedorenko, supra*, the American Jewish Congress and the American Jewish Committee urged that where an applicant for admission to the United States, under the former Displaced Persons Act, 62 Stat. 1009 (1948) ("DPA"), had lied or willfully concealed facts (his service as a concentration camp guard), which facts, if disclosed, would have been helpful in an investigation that might lead to exclusion, such lies or concealment themselves justified exclusion. *See* 1980 WL 339961 at *9 (U.S. July 18, 1980) (brief *amicus curiae* of the American Jewish Congress); 1980 WL 339962 at *11 (U.S. July 24, 1980) (brief *amicus curiae* of the American Jewish Committee). The briefs *amici curiae* did not reach the issue of whether an applicant had acted voluntarily or under duress. *Id.*

This Court, however, did reach the issue, and determined that whether an applicant in that petitioner's situation had acted voluntarily or under duress was irrelevant. *Fedorenko* 449 U.S. at 509. However, in a footnote, the Court recognized that the nature of the applicant's acts could in "[o]ther cases" become pertinent:

> The solution to the problem perceived by the District Court . . . lies not in "interpreting" the Act to include a voluntariness requirement that the statute itself does not impose, but in focusing on whether the particular conduct can be considered assisting in

> the *persecution* of civilians. Thus, an individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

Id. at 514, n. 34 (emphasis in original). In sum, under the DPA, the voluntariness of conduct was not specifically at issue because it was the overall inherent nature of the conduct that was germane.

This proceeding, however, applies law that is newer than the DPA, and does address the issue of voluntariness. Currently applicable law requires a court to decide whether acts committed under compulsion or duress amount to preclusive conduct. Consider the following now familiar scenario: human shields, behind whose protective cover terrorists lurk until ready to kill or maim, assist persecutors by providing cover, whether by opening their homes as camouflage for missile batteries or providing a human phalanx. If they seek asylum in this country, are they persons "who assisted in the persecution" of

civilians? Does it matter whether they were acting under duress or were part and parcel of the terrorist plot? The *amici* here say that it does matter.[2] Under currently applicable law, the court is bound to determine their culpability. Concisely put, culpability for persecutory conduct is the standard under the current statutory scheme.

The Statutory Scheme

In 1946, in response to the massive and immediate refugee problem in Europe created by World War II, the Constitution of the International Refugee Organization was presented for signature by the member states of the United Nations. *Opened for signature* Dec. 15, 1946, 62 Stat. 3027, T.I.A.S.

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[2] The concept of culpability as the essential predicate for punishment is firmly rooted in Judeo-Christian teachings. The book of *Deuteronomy* states that "If a damsel that is a virgin be betrothed unto an husband, and a man find her in the city and lie with her; Then ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die . . . But if a man find a betrothed damsel in the field, and the man force her, and lie with her: then the man only that lay with her shall die: But unto the damsel thou shalt do nothing; there is in the damsel no sin worthy of death . . . For he found her in the field, and the betrothed damsel cried, and there was none to save her." *Deuteronomy* 22:23-27 (King James). Thus, the attacker alone would be punished where he forced his partner into sin. The twelfth century biblical scholar, Moses Maimonides, emphasizes the essential distinction as being one of culpability, and concludes that this biblical stricture teaches that, where a person forces another "to commit a sin by threatening to kill him if he doesn't, then he should commit the sin in order not to be killed." Moses Maimonides, *Law of Fundamentals of the Torah*, Chapter 5, *available at* http://www.panix.com/~jjbaker/MadaYHT.html.

No. 1846 (1948) ("IRO Constitution"). The IRO Constitution, which created the precursor agency to today's Office of the United Nations High Commissioner for Refugees ("UNHCR"), sought to assist in the resettlement and repatriation of European refugees. In so doing, the IRO Constitution introduced a definition of the term "refugee" that was specific to the immediate refugee problem and was entirely influenced by the recent war. It endeavored both to assist victims of the conflict and to exclude from its assistance wartime enemies of the Allied Forces. That Constitution thus drew a distinction between "bona fide refugees and displaced persons" on the one hand, and, on the other hand, "war criminals, quislings and traitors [and] any other persons who . . . assisted the enemy in persecuting civil populations . . . or . . . voluntarily assisted the enemy forces . . . against the United Nations". IRO Constitution, Annex 1, Pt. I, § A and Pt. II.

The IRO Constitution's definition of refugees and displaced persons was adopted, by reference, into the 1948 DPA, a law passed by Congress to facilitate the absorption into, as well as exclusion from, the United States of certain European refugees. 62 Stat. 1009. The DPA is also the law which this Court applied in 1981 to affirm the denaturalization of a former Nazi concentration camp guard who had lied about his past in order to skirt the DPA's restrictions. *See Fedorenko*, 449 U.S. at 496-97, 507, 513-14.

The DPA expired in 1954, and it does not apply to Petitioner Negusie, a stowaway who reached this country in 2004. The Court of Appeals for the Fifth

Circuit, in citing *Fedorenko* in its interpretation of the DPA to support the denial of Mr. Negusie's asylum and withholding of removal claims, ignores this important detail. *Negusie v. Gonzales*, 231 Fed. Appx. 325, 326 (5th Cir. 2007). In fact, here, a different law applies, namely, the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq*.

Like the DPA, the INA is affected by the IRO Constitution's definition of "refugee," but far less directly. The "refugee" definition from the IRO Constitution influenced, and provided a baseline for, the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Refugee Convention"). *Done* July 28, 1951, 189 U.N.T.S. 150. The 1951 Refugee Convention, in turn, was the original source of the meaning of "refugee" that currently appears in the INA. *See* S. Rep. No. 96-256, at 4 (1979), *reprinted in* 1980 U.S.S.C.A.N. 141, 144. But that is significantly different from the DPA's wholesale adoption of the IRO Constitution's refugee definition.

Even though the DPA and the INA both incorporate and use the term "refugee" based on language that originated in a document drafted in 1946, the now-defunct DPA simply adopted that language verbatim, while the still-current INA uses significantly different words—words that were added to it via the 1980 Refugee Act and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), and that were informed not just by the 1951 Refugee Convention, but also by the evolving international and humanitarian obligations of the United States over the second half of the twentieth century to open its borders to refugees and

to aid the world in easing refugees' plight. *See* Refugee Act of 1980, P.L. 96-212, 94 Stat. 102, § 101 ("Purpose") (96th Cong. 1980). The purpose of those added words was to "bring United States law into conformity with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968 [the "1967 Refugee Protocol"], and the [1951 Refugee Convention] which is incorporated by reference into United States law through the Protocol." S. Rep. No. 96-256, at 4; *accord,* S. Rep. No. 96-590, at 20 (1980) (noting that the definition of refugee was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol."); *see also* H.R. Rep. No. 96-608, at 9 (1979).

The "conformity with our international treaty obligations" imposed by the 1967 Refugee Protocol and the 1951 Refugee Convention requires, when determining whether an alien may fairly be called a refugee, the application of standards of criminal culpability. *See* Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1992) ("Handbook") ¶¶ 147-150, 162 ("it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature").

Thus, the 1948 DPA, which was actually passed two months *before* the formal entry into force of the IRO Constitution from which its use of "refugee" was derived, was a quick reaction to an immediate post-

World War II crisis that combined the humanitarian need for easing the burden posed by over a million European refugees with a desire for retribution against recently vanquished aggressors. It reflected an understandably cautious approach to the admission of aliens into this country, and was particularly concerned with ensuring this country's aid and protection did not extend to its recently defeated enemies or their sympathizers. By contrast, the INA, through its numerous and substantial amendments over the years, is not bottomed upon a need to exact retributive justice, but has come to be a durable and widely applicable expression of a generous policy of admission.

Seen in this historic context, the difference in the way the DPA and the INA deal with "refugees" is not merely semantic, but is substantive. When the DPA excluded from its protection aliens who "assisted the enemy in persecuting civil populations of countries, Members of the United Nations" it was intended, as established by reliable expert testimony in *Fedorenko*, to exclude even those armed guards who claimed they were forced involuntarily into service. *See Fedorenko*, 449 U.S. at 499 n. 14, 510 n. 32. By contrast, when the INA excludes from its protection aliens who "ordered, incited, assisted, or otherwise participated in the persecution" of others, INA §§ 101(a)(42), 208(b)(2)(A)(i), 241(b)(3)(B)(i); 8 U.S.C. §§ 1101(a)(42), 1158(b)(2)(A)(i), 1231(b)(3)(B)(i), it means those who did so with criminal culpability sufficient to warrant denial of the protection of the international community as expressed in the 1951 Refugee Convention and the 1967 Refugee Protocol. *See* S. Rep. No. 96-590, at 20; Handbook, at ¶¶ 150,

162. Whether an alien asylee possesses such culpability must therefore be determined by the fact finder before asylum or withholding of removal can be denied on the basis that the alien was a persecutor. It is this determination that the Court of Appeals for the Fifth Circuit dispensed with. It must be made, on remand.

ARGUMENT

POINT I The Legislative History Makes Clear That While the DPA Was Intended To Exclude Any Enemy Persecutor, the INA Excludes Only Those Who Are Criminally Culpable

A. The DPA Was a Remedy Specific to the Consequences of World War II

The DPA provisions that dictated which aliens would not benefit from its protections are not useful for interpreting similar provisions of the INA because the respective provisions serve different purposes.

1. The DPA Was a Response to an Urgent Need for Resettlement of Over One Million European Refugees

The DPA was passed in 1948 to "authorize for a limited period of time the admission into the United States of certain European displaced persons". 62 Stat. 1009, Preamble. At that time, over one million refugees were living in displaced person camps throughout Europe, unwilling or unable to resettle in their home countries. The DPA's provisions do not address a timeless, global humanitarian issue, but instead refer explicitly to particular groups of victims of the Second World War, including victims of the Nazi regime, victims of the Fascist regime in Spain, and German or Austrian Jews, persecuted by the Nazis, who remained unsettled. In choosing these groups for special protection, Congress merely copied their descriptions wholesale from the Constitution of the IRO, a document that the United States had

approved in 1947, but which would not even be entered into force (following its acceptance by at least fifteen nations) until August of 1948, two months after the DPA became law. *Compare* DPA, 62 Stat. 1009 (approved June 25, 1948) *with* IRO Constitution, 62 Stat. 3037 (entered into force Aug. 20, 1948). Pursuant to the DPA,

> "Displaced Person" means any displaced person or refugee as defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization.

62 Stat. at 1009. Annex I of the IRO Constitution, in turn, defined a refugee or a displaced person as follows:

> the term "refugee" applies to a person who has left, or who is outside of, his country of nationality or of former habitual residence, and who, whether or not he had retained his nationality, belongs to one of the following categories:
>
> (a) victims of the nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted them against the United Nations, whether enjoying international status as refugees or not;
>
> (b) Spanish Republicans and other victims of the Falangist regime in

Spain, whether enjoying international status as refugees or not;

* * *

[T]he term "refugee" also applies to a person . . . who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.

* * *

[T]he term "refugee" also applies to persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those countries as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.

* * *

The term "displaced person" applies to a person who, as a result of the actions of the authorities of the regimes mentioned in Part I, section A, paragraph 1 (a) of this Annex has been deported from, or has been obliged to leave his country of nationality or of former habitual residence, such as persons who were compelled to

> undertake forced labour or who were deported for racial, religious or political reasons.

IRO Constitution, Annex I, Pt. I, §§ A, B. Thus the DPA (via the IRO Constitution definitions) focused specifically on refugees victimized by the Second World War. *Id.*[3]

Further, the DPA applied strict quotas on aliens based on ethnicity and nationality, reflecting the remnants of pre-war bias against certain types of immigrants, and demonstrating that the DPA was a cautious and narrow solution to the pressing refugee problem, not to a more universal issue. *See* DPA §§ 3, 5, 6. The DPA, like its international companion, sought to resolve an immediate crisis, and to do so "in the shortest possible time". IRO Constitution, Preamble.

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[3] Classic cases of "displaced" persons within the intendment of the IRO Constitution were the legions who had been deported from Poland to perform forced labor in Austria and Germany and who, at war's end, could not find either the strength or the means to return to shattered homes and who for seemingly interminable periods languished in "DP Camps," joining the human wreckage that had emerged from Mauthausen, Auschwitz and other testimonials to man's inhumanity to man. *See* Robert Knight, *Restitution and Legitimacy in Post-War Austria, 1945-1953*, Leo Baeck Institute Yearbook (1991); Michael Burri, *Postwar Contexts and the Literary Legacy of Forced Labor In Austria*, 93 New German Critique 103 (2004).

2. The DPA Explicitly Withheld its Protection from World War II War Criminals, Quislings, Traitors, and Those Who Assisted the Enemy

At the same time, the United States had only just completed its sacrifice of almost half a million lives to the war, *see* Michael Clodfelter, *Warfare and Armed Conflicts: A Statistical Reference to Casualty and Other Figures, 1500-2000* (2d ed. 2002), and, like others in the United Nations, was not eager to aid and protect those who had caused the loss. *See* Handbook, ¶ 148 (noting agreement that war criminals should not be protected). This sentiment was expressed in the international resolution that initiated the IRO's creation:

> no action taken as a result of this resolution shall be of such a character as to interfere in any way with the surrender and punishment of war criminals, quislings and traitors . . . .

IRO Constitution, Annex III, ¶ (d). Accordingly, the DPA, again by adoption of the IRO Constitution's definition, did not protect specific people:

> 1. War criminals, quislings and traitors.
> 2. Any other persons who can be shown:
> (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
> (b) to have voluntarily assisted the enemy forces since the outbreak of the

> second world war in their operations against the United Nations.

IRO Constitution, Annex 1, Pt. II. Thus, special care was taken to exclude from the umbrella of protection designed for refugees certain categories of persons – war criminals, quislings,[4] and traitors – who had opposed the Allies, without regard to whether that opposition was coerced or voluntary. Similarly, even without having done so "voluntarily," a person otherwise considered a refugee who assisted the enemy in persecution was denied the DPA's protections. *Id.* In this way, Congress expressed a clear distinction not between refugees and criminal refugees, but between refugees and enemy refugees. DPA § 2.

B. The INA, as Amended in 1980 and 1996, Reflects a Permanent, Global, and Humanitarian Commitment to Assist Refugees

In contrast to the DPA, the relevant INA provisions do not make any reference to "the enemy." *See generally* INA §§ 101(a)(42), 208(b), 241(b)(3), 8 U.S.C. §§ 1101(a)(42), 1158(b), 1231(b)(3). The provisions at issue here were added to the INA by the 1980 Refugee Act, P.L. 96-212, 94 Stat. 102 (96th Cong. 1980), and the 1996 IIRIRA, P.L. 104-208, 110

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[4] A quisling – a traitor or collaborationist, most commonly used to refer to members of fascist political parties or military or paramilitary forces in occupied Allied countries who collaborated with Axis occupiers – is a term named after Norwegian politician Vidkun Quisling, who assisted Nazi Germany in conquering his own country. *See The Columbia Encyclopedia* 2263 (5th ed. Columbia Univ. Press 1993).

Stat. 3009-546 (104th Cong. 1997). Those two acts amended the INA to improve this country's ability to handle its alien refugees, and the changes made reflect that purpose.

The 1980 Refugee Act modified the definition of "refugee" in INA Section 101 to exclude those who engaged in persecution, so as to remain consistent with the 1951 Refugee Convention and the 1967 Refugee Protocol (*see* H.R. Rep. No. 96-608, at 10), which the United States had committed, in 1968, to following. *See* 1967 Protocol, 19 U.S.T. 6223, 606 U.N.T.S. 267. Indeed, as this Court has observed, "[i]f one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 [Refugee] Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with" the 1967 Refugee Protocol. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Further, the 1980 Refugee Act was designed to broaden the scope of refugees admitted from the far narrower one imposed immediately after World War II. In hearings on the act, former Senator Dick Clark, the appointed United States Coordinator for Refugee Affairs, testified that the then-existing legislative framework "was originally designed to deal with people fleeing Communist regimes in Eastern Europe or repressive governments in the Middle East in the immediate post-war period and the early cold war years." *The Refugee Act of 1979:* Hearings before U.S. Senate Committee on the Judiciary, 96th Cong. 9 (Mar. 14, 1979). He stated that such a framework was "inadequate to cope with the refugee problem we face today." *Id.*

Like the 1980 Refugee Act, the 1996 IIRIRA and the 1995 I.N.S. administrative reforms prior to the IIRIRA's enactment were also consistent with the 1951 Refugee Convention. They were designed to streamline the asylum system and to thwart those aliens who, temporarily released into the United States with a scheduled asylum hearing date, would illegally remain without appearing for their hearing. *See Asylum and Inspections Reform:* Hearings before Subcomm. on Int'l Law, Immigration, and Refugees, of the Comm. on the Judiciary, 103d Cong. 2-3 (Apr. 27, 1993) (statement of chair and H.R. 1679 sponsor Rep. Romano L. Mazzoli). The IIRIRA reemphasized the persecution exclusion, already embodied in the definition of "refugee," by redundantly adding it as an exception to the INA sections on asylum (INA § 208, 8 U.S.C. § 1158) and withholding of removal (INA § 241, 8 U.S.C. § 1231). *See* H.R. Res. 1679, 103d Cong. §§ 2, 4 (1993).

Thus, by amending the INA, both the 1980 and 1996 acts codified the obligations that the United States had years earlier undertaken, when it acceded to the 1951 Refugee Convention (via the 1967 Refugee Protocol).

The 1951 Refugee Convention was in important ways a departure from the IRO Constitution and similar international agreements. For instance, "[w]hile earlier international instruments only applied to specific groups of refugees, the definition of the term 'refugee' contained in Art. I of the 1951 [Refugee] Convention is couched in general terms." UNHCR, *Introductory Note* to the Convention and Protocol relating to the Status of Refugees (Geneva,

Aug. 2007). Indeed, ethnicity and nationality-based quotas employed by the DPA, and still used by the I.N.S. after 1951, were eliminated by the 1980 Refugee Act, which instead mandated broader overall ceilings on numbers of immigrants.

The 1951 Refugee Convention sought not only to apply to all refugees globally, but to broaden overall the protections provided by previous agreements. *See* United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems* 37 (Feb. 17, 1950) (U.N. Doc. E/1618, E/AC.32/5) ("In drafting this convention, the Committee gave careful consideration to the provisions of previous international agreements. It sought . . . to assure that the new consolidated convention should afford *at least* as much protection to refugees as had been provided by previous agreements.") (emphasis added). The Preamble of the 1951 Convention states plainly that "it is desirable . . . to extend the scope of and protection accorded by" previous international agreements relating to the status of refugees "by means of a new agreement." 1951 Refugee Convention, Preamble.

Its departure from the IRO Constitution is evident in the language it uses to define those refugees it will not protect:

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the

> international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

1951 Refugee Convention, Art. 1(F).

Gone are any mention of "quislings" and "traitors," and gone are any exclusions for any conduct except that involving "crime" or "guilt." *Id.* In contrast to the exclusions in the DPA (taken from the IRO Constitution), the exclusions in the 1951 Refugee Convention all pertain to criminal conduct. *See* Handbook, ¶¶ 147-150, 162 ("it has to be assumed . . . that the acts covered by the present clause must also be of a criminal nature.")[5]. This is true even though, at least with regard to subsection (c) above, "this is not specifically stated". *Id.* at ¶ 162.

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[5] The UNHCR Handbook (Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*) is a tool "for the guidance of government officials concerned with the determination of refugee status in the various Contracting States." Handbook, Preface at 2; *see also I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999) (acknowledging that Handbook provides guidance in construing provisions added to INA by Refugee Act).

Narrowing the exclusion of refugees to those who have the culpability necessary to have actually committed a crime is consistent with the goals and purposes of the 1951 Refugee Convention. *See* 1951 Refugee Convention, Preamble. It emphasizes "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas". 1980 Refugee Act, 94 Stat. at 102, § 101. And it guarantees that innocent refugees will not be denied the protections that the United States has promised it will provide.

To be sure, where the INA intends certain aliens to be excluded regardless of their criminal culpability, it does so plainly. *See e.g.* INA § 212(a)(3)(B)(i)(V), 8 U.S.C. § 1182(a)(3)(B)(i)(V) (deeming inadmissible, without reference to conduct or culpability, any alien member of certain terrorist organizations); *accord*, INA § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i) (granting Secretaries of State and Homeland Security power to grant waivers to certain otherwise excludable aliens, except "no such waiver may be extended to an alien who is a member or representative of" certain terrorist organizations). In the statutory provisions applicable here, however, there is no intent to deny protection of the INA to refugees who bear no culpability for the persecutory actions they were forced to participate in. INA §§ 101(a)(42), 208(b), 241(b)(3), 8 U.S.C. §§ 1101(a)(42), 1158(b), 1231(b)(3).

POINT II The INA, Not the DPA, Applies to the Instant Asylum and Withholding Claims

There is no dispute that Petitioner Negusie's demands for asylum and withholding of removal fall under the INA, not the DPA. But the Immigration Judge, in a decision eventually affirmed by the Board of Immigration Appeals and the Court of Appeals for the Fifth Circuit, looked to this Court's interpretation of the DPA to decide whether the INA extended its protections to an armed guard in a prison where persecution occurred, without any analysis of how the statutes differed on this point. *See In re Nugusa,* File A 15 575 924 (Immigration Ct. May 31, 2005) (citing *Fedorenko* and *U.S. v. Schmidt*, 923 F.2d 1253 (7th Cir. 1991) (affirming denaturalization of former guard at Nazi concentration camp based on application of DPA)), *aff'd sub nom. In re Nugusie,* File A15 575 924 (BIA Feb. 7, 2006), *aff'd sub nom. Negusie v. Gonzales*, 231 Fed. Appx. 325 (5th Cir. 2007). Because the DPA is a different law whose purposes in 1948, relating to the refusal to extend itself to certain aliens, would not be consistent with the purposes of the INA today, *compare supra* Point I. A *with supra* Point I. B, the immigration judge erred in directly applying the DPA.

POINT III Applying the INA Standard, Petitioner Is Entitled to a Factual Determination Regarding His Criminal Culpability

At the outset of this submission the *amici* noted that this Court in *Fedorenko* evidenced its understanding that culpability, like so much in life,

has gradations. This Court observed that the inmate who cut the victims' hair before execution stood in different shoes than the armed inmate guard who was at liberty to leave the concentration camp and who fired upon escapees. *Fedorenko,* 449 U.S. at 512, n. 34. This Court declined then to couch the issue in terms of "voluntariness" but did so in terms of "whether the particular conduct can be considered assisting in the *persecution* of civilians." *Id.* Howsoever viewed, the distinction conveys a difference, one between those who a fact finder concludes are culpable and those found not to be.

How to measure culpability under the INA should be guided by the 1951 Refugee Convention and the 1967 Refugee Protocol because Congress intended the INA to comply with this country's obligations under those agreements. *See Aguirre-Aguirre*, 526 U.S. at 427. The Convention and Protocol, in defining who is excluded from the protections afforded to otherwise eligible refugees, point to crimes "as defined in the international instruments drawn up to make provision in respect of such crimes." 1951 Convention, Art. 1F(a).[6]

The "international instruments" include several different agreements dating from the end of World War II to the present, all of which define and proscribe various forms of conduct of a criminal

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[6] The Convention and Protocol also point to "acts contrary to the purposes and principles of the United Nations" which have been interpreted to refer to conduct of a criminal nature, overlapping with the types of conduct proscribed by contemporary "international instruments." 1951 Convention, Art. 1F(c); Handbook, at ¶ 162.

nature. *See* Handbook, at ¶ 150, Annex VI (listing agreements). Not surprisingly, in these agreements "persecution" is among the conduct considered criminal. *See, e.g. Control Council Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50-55 (1946), Art. II(c) ("Crimes Against Humanity" include "persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated"); *1945 London Agreement and Charter of the International Military Tribunal,* Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, Art. 6(c) (similar definition); Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 ("Rome Statute"), Art. 7(1)(h) (crimes against humanity include "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law").

The conduct prohibited as criminal by the various instruments incorporates an attendant criminal culpability, either by implication, or explicitly. *See, e.g.* Rome Statute, Art. 30 (describing *mens rea* required for finding of culpability), Art. 31 (describing defenses to culpability). Without such culpability, the actor cannot be guilty of the proscribed conduct.

For instance, pursuant to the Rome Statute – the 1998 treaty entered into force in 2002 establishing the International Criminal Court – "a person shall

not be criminally responsible" for otherwise criminal conduct if the conduct was "caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person". Art. 31(1)(d). Clearly, the international community demands culpability as an element of any charged war crime or crime against humanity, and that culpability requirement extends, via the 1951 Refugee Convention and 1967 Refugee Protocol, into United States Immigration law.[7]

Because the 1951 Refugee Convention and 1967 Refugee Protocol rely on the definitions of criminal conduct found in "international instruments" such as the Rome Statute to assess whether an actor is unworthy of protection, the portions of the INA relevant to the instant case, which codify this country's conformity with the Convention and Protocol, must rely on them too. *See* S. Rep. No. 96-256, at 4 (1980 Refugee Act amending the INA was intended to "bring United States law into conformity with our international treaty obligations under the [1951 Refugee Convention and 1967 Refugee Protocol]"); S. Rep. No. 96-590, at 20 (noting that the definition of refugee was accepted "with the understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the

[7] Instructively, the Rome Statute also states that "[t]he Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it." Art. 31(2). The Immigration Judge in an asylum and withholding proceeding would do the same.

Protocol."). The applicable international definitions of excludable conduct incorporate culpability for prohibited crimes. *See* 1951 Refugee Convention, Art. 1F(a). That too is the standard that the legislative history of the INA clearly mandates, and which the *amici* here urge.[8] The omission to even consider, let alone apply, that standard compels reversal and remand.

[8] Note that this imposes no new hardship on the government nor demands any new judicial resources because, under the INA, the burden of proving admissibility already falls squarely on a non-resident alien (such as a stowaway like Petitioner Negusie), *see* INA § 291, 8 U.S.C. § 1361, and the credibility of the alien's testimony alone is sufficient for an immigration judge to decide the issue, *see* INA § 208(b)(1)(B)(ii)-(iii), 8 U.S.C. § 1158(b)(1)(B)(ii)-(iii); INA § 241(b)(3)(C), 8 U.S.C. § 1231(b)(3)(C).

CONCLUSION

For the reasons stated, the judgment should be reversed and remanded for a redetermination that considers whether Petitioner's actions as an armed guard in an Eritrean military prison were performed under duress or coercive threat sufficient to relieve him of the criminal culpability necessary to render him ineligible, as a persecutor of others, for asylum and withholding of removal under the Immigration and Nationality Act.

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